U.S. Senate
Republican Policy
Committee

Legislative Notice

Jon Kyl, Chairman

No. 60 April 5, 2004

S. 2207 – The Pregnancy and Trauma Care Access Protection Act of 2004

Calendar No. 462

Read the second time and placed on the Senate Calendar on March 22, 2004; no written report.

NOTEWORTHY

- On April 2, the Majority Leader filed a cloture motion to proceed to S. 2207, The Pregnancy and Trauma Care Access Protection Act of 2004. The Senate likely will vote on the motion to proceed on Wednesday, April 7.

- S. 2207 was introduced on March 12 by Senator Gregg. It is cosponsored by Senator Ensign, the sponsor of S. 11, The Patients First Act, which was a more comprehensive medical liability reform bill considered last year. On July 9, 2003, a vote on cloture on the motion to proceed to S. 11 was not invoked by a vote of 49-48.

- The bill improves women's access to obstetric and gynecological (ob/gyn) services, as well as the access of individuals with emergency medical conditions by reducing the effects of excessive liability costs for such providers.

- There is no official score from the Congressional Budget Office on S. 2207. However, CBO announced last year that the House medical liability reform bill, H.R. 5 (similar in scope to S. 11), "would lower [medical liability] premiums nationwide by an average of 25 to 30 percent from the levels likely to occur under current law." The Joint Economic Committee also stated previously that the Federal government would save an additional $16.7 billion over 10 years due to reduced costs associated with defensive medicine.

- As of press time, there is no Statement of Administration Policy (SAP) for S. 2207, although the White House issued a SAP strongly supporting passage of S. 11 (dated July 7, 2003), and another in support of S. 2061 (dated February 24, 2004). In addition, the President has emphasized support for medical liability reform during this year's State of the Union address, as well as his 2003 address.

HIGHLIGHTS

- **Scope.** S. 2207 applies to ob/gyn and emergency services. It also applies to health plans and medical products with regard to ob/gyn and emergency services.

- **Patient compensation.** The bill provides an unlimited amount of damages for actual economic losses. In addition, the measure allows up to $250,000 to be awarded for non-economic damages (commonly referred to as "pain and suffering" damages).

- **Punitive damages.** The bill raises the "burden of proof" standard, requiring the claimant to demonstrate by clear and convincing evidence that the defendant acted with malicious intent to injure, or that the defendant deliberately failed to avoid unnecessary injury to the victim. The legislation allows punitive damages of $250,000 or twice economic damages, whichever is greater. Punitive damages are not permitted for products used for ob/gyn and emergency services that are in compliance with standards set forth by the Food and Drug Administration (FDA).

- **Periodic payments.** The bill permits periodic payments of future damages to claimants for awards equaling or exceeding $50,000.

- **Filing of claims.** The bill requires that a lawsuit be brought within three years of the date of injury or one year after the claimant discovers or should have discovered the injury, whichever occurs first. It establishes exceptions for cases involving minors.

- **Payment recovery.** The bill requires collateral source payments to be offset from awards, such as payments from a health insurer.

- **State flexibility.** The bill preserves states' rights by keeping state medical liability statutes in place and by allowing future state laws to supercede federal limits on damages, often referred to as the "flexicap." In addition, the measure defers to state law concerning subrogation, which allows health plans to be reimbursed by liability insurers for any costs incurred.

BACKGROUND

For years, health care providers have faced difficulty obtaining affordable medical liability coverage, especially as it relates to high-risk services, including emergency and obstetrical and gynecological ("ob/gyn") coverage. The problem now is so great that many women are being deprived access to crucial medical care as hospitals and physicians find it increasingly difficult to continue offering certain critical services.

Data from the American Medical Association indicates that 19 states currently face a medical liability "crisis," 25 states show "problem signs," and 6 states report "okay" status.[1] Women of childbearing age have been impacted the most because 1 out of 11 obstetricians nationwide have stopped delivering babies and, instead, have scaled back their practices to gynecology only.[2]

Patients are finding it increasingly difficult to obtain affordable, quality health care, and those who can afford it are paying more in the form of costlier health insurance. While the crisis is reminiscent of the 1970s [for details, see the RPC paper, "The Medical Liability Crisis and its Impact on Patients," issued February 5, 2003], the difference today is the increase in the number and size of jury awards. The amount paid per claim and the size of the award bring new challenges for the liability insurance system. A recent PIAA survey demonstrates a four-fold increase in the percentage of jury awards in excess of $1 million between 1991 and 2002.[3] The increase in awards and claim payments has, in turn, led to reduced medical underwriting capacity from the marketplace.[4] Those insurers that left the medical underwriting market include St. Paul Companies (formerly the largest medical liability carrier in the United States), PHICO, Frontier Insurance Group, Doctors Insurance Reciprocal, and MIXX (except for policies issued in New Jersey).

Given the impact on patient access to medical care, Congress has considered medical liability legislation on several occasions. The issue was debated extensively in the 104th Congress and almost every session thereafter. On February 24, the Senate debated a cloture motion to proceed to consideration of S. 2061, The Healthy Mothers and Healthy Babies Access to Care Act of 2004. Cloture was not invoked by a vote of 48-45.

BILL PROVISIONS

S. 2207 was introduced on March 12 by Senator Gregg, chairman of the Health, Education, Labor, and Pensions Committee. It is cosponsored by Senator Ensign. The measure was placed on the Senate Calendar under Rule 14.

Section 1 – Title

This Act may be cited as the "The Pregnancy and Trauma Care Access Protection Act."

---

[1] "State Crisis Map," American Medical Association, July 7, 2003.

[2] "Why America Needs Medical Liability Reform," The Health Coalition on Liability and Access.

[3] PIAA Data Sharing Project, May 2002.

[4] "A New Crisis for the Med Mal Market?" Tillinghast-Towers Perrin, February 11, 2003. A recent report released by Tillinghast-Towers Perrin, an actuarial firm, found similar liability-related losses, leading to a 15-percent reduction of medical underwriting capacity from the marketplace over the past three years.

Section 2 – Encouraging Speedy Resolution of Claims

Requires that a lawsuit be brought within three years of the date of injury, or one year after the claimant discovers or should have discovered the injury, whichever occurs first. Allows for exceptions upon proof of fraud, intentional concealment, or the presence of a foreign body which has no therapeutic or diagnostic purpose in the injured person. Section 3 liberalizes the statute of limitations for children under the age of 6.

Section 3 – Compensating Patient Injury

Permits patients to fully recover their economic damages, such as hospital bills and lost wages, without any limitation. Patients also can be awarded up to $250,000 for any non-economic damages, regardless of the number of parties against whom the action is brought or the number of separate claims or actions brought with respect to the same occurrence. The section also creates a "fair share rule," ensuring that each party is responsible for their own share of damages and not for the share of any other defendant.

Section 4 – Maximizing Patient Recovery

Requires court supervision of payment arrangements to protect against conflicts of interest that may result in fewer damages actually paid to the claimant. Also establishes attorney contingency fees using the following scale: 1) 40 percent of the first $50,000 recovered by the claimant; 2) 33.3 percent of the next $50,000; 3) 25 percent of the next $500,000; and 4) 15 percent of any amount recovered in excess of $600,000. In addition, the section creates an expert witness rule, requiring individuals to be health care professionals who are appropriately credentialed or licensed, have experience in treating the diagnosis under review, and are substantially familiar with the standards of care related to the lawsuit.

Section 5 – Promoting Fairness in Recovering Health Benefits and Preventing Double Recoveries

Requires collateral source payments to be offset from awards, such as a health insurer. In addition, section 5 preserves state law concerning subrogation, which allows health plans to be reimbursed by liability insurers for any costs they may incur.

Section 6 – Punitive Damages

Permits punitive damages, if otherwise permitted by applicable state or Federal law, only if it is proven by clear and convincing evidence that the defendant acted with malicious intent to injure the claimant, or that the defendant failed to avoid unnecessary injury to the victim.

Specifies certain factors to be considered when determining punitive damages, including severity, duration or concealment, profitability, number of products sold or medical procedures rendered for compensation, criminal penalties, and any civil fines assessed as a result of the defendant's conduct. The amount of punitive damages shall be the greater of two times the economic damages or $250,000. The section also prohibits the award of punitive damages for medical products unless the claimant demonstrates by clear and convincing evidence that the manufacturer or distributor failed to comply with specific requirements imposed by the Federal Food, Drug, and Cosmetic Act. In addition, the section prohibits liability from being assessed

against a physician in a product liability lawsuit merely because the doctor prescribed a drug that was approved by the Food and Drug Administration.

Section 7 – Authorization of Payment of Future Damages to Claimants in Health Care Lawsuits

Allows court judgments, at the request of any party, to pay future damages periodically. Such authorization applies only to future awards equaling or exceeding $50,000.

Section 8 – Effect on Other Laws

Excludes suits for vaccine-related death or injury from the requirements of S. 2207 if otherwise covered under the National Vaccine Injury Compensation Program and the Smallpox Compensation Fund.

Section 9 – State Flexibility and Protection of States' Rights

The bill permits state liability caps to remain in effect or to be enacted at a future date, often referred to as the "flexicap."

Section 10 – Definitions

Establishes a series of definitions, including the term, "Alternative Dispute Resolution (ADR) system" and "obstetrical and gynecological and emergency services."

Section 11 – Applicability; Effective Date

Specifies that S. 2207 shall apply to any health-care lawsuit brought in a federal or state court, or subject to an alternative dispute resolution system, that is initiated on or after the date of enactment. Any health-care lawsuit arising from an injury occurring prior to the date of enactment shall be governed by the applicable statute of limitations in effect at the time of injury.

ADMINISTRATION POSITION

As of press time, there is no Statement of Administration Policy (SAP) for S. 2207, although the White House issued a SAP strongly supporting passage of S. 11 (dated July 7, 2003), and another in support of S. 2061 (dated February 24, 2004). In addition, the President has emphasized support for medical liability reform during this year's State of the Union address, as well as his 2003 address.

COST

There is no official score from the Congressional Budget Office (CBO) on S. 2207. However, CBO announced last year that the House medical liability bill (H.R. 5) "would lower [medical liability] premiums nationwide by an average of 25 to 30 percent from the levels likely to occur under current law." CBO also announced that the House bill "would reduce federal direct spending by $14.9 billion over the FY 2004-2013 period for Medicare, Medicaid, the government's share of premiums for annuitants under the Federal Employees Health Benefits

Program (FEHBP), and other federal health benefits programs." [For details, see CBO's report on H.R. 5, available from www.cbo.gov.]

The Joint Economic Committee also has stated previously that the federal government would save an additional $16.7 billion over 10 years due to reduced costs associated with defensive medicine.

POSSIBLE AMENDMENTS

No amendments were known at press time.